The ANTITRUST BULLETIN

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ANTITRUST PROBLEMS OF FAIR TRADING

by

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FAIR TRADE IS the name—or misnomer, to its critics[1]—applied to the system of resale price maintenance for branded or trade-marked commodities that includes the famous "non-signer clause," under which every merchant with knowledge of the existence of the price-fixing system is prohibited from selling below the established price even though he did not himself enter into any agreement to maintain prices. The statutory scheme is complex; it developed out of legal doubts and economic pressures.

Efforts by manufacturers to fix resale prices for their products at wholesale and at retail long antedate the Fair Trade statutes. Resale price maintenance is vertical price-fixing—agreements between suppliers and their vendees—as contrasted with horizontal price-fixing, which involves agreements between manufacturers of competing products, or between competing retailers and the like. Since vertical price-fixing affects only the resale prices established for products of a single manufacturer, who must continue to face competition at his own level, it was long doubted whether resale price maintenance agreements were in restraint of trade like horizontal agreements which directly eliminate competition. This doubt survived the passage of the Sherman Antitrust Act[2] in 1890, but the United States Supreme Court eliminated it by the *Dr. Miles Medical Company* decision[3] in 1911, which held that vertical price-fixing was just as objectionable as horizontal price-fixing. The Court pointed out that the effect of a resale price maintenance program, even though instituted by the manufacturer, is identical to the effect of a horizontal agreement among all retailers to charge the same price for the product. It also noted that the manufacturer's attempt to fix the resale price of the product in the hands of an independent purchaser was a species of restraint upon alienation

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1 *E.g.*, Circuit Judge Holmes, dissenting in *Schwegmann Bros. Giant Super Market* v. *Eli Lilly & Co.*, 205 F. 2d 788, 796 (5th Cir., 1953), *cert. den.* 346 U. S. 856.

2 26 Stat. 209 (1890), 15 U. S. C. §1 *et seq.*

3 *Dr. Miles Medical Company* v. *Park & Sons*, 220 U. S. 373 (1911).

that, among other things, deprived the general public of the benefits of free competition in the resale of merchandise that the manufacturer no longer owned. Accordingly, resale price maintenance agreements were declared void at common law and also in violation of Section 1 of the Sherman Antitrust Act when they involved interstate commerce.[4]

Repeated efforts to secure legislative exemption for vertical price-fixing were made in Congress but proponents of resale price maintenance achieved their initial success only after turning to the state legislatures. The first such statute was passed in California in 1931, aided no doubt by the psychology of the Great Depression and perhaps also by the fact that the name "Fair Trade" had been coined for such legislation.[5] The 1931 California Fair Trade Act exempted contracts fixing resale prices for branded commodities from all legal prohibitions. It proved unworkable in practice because cut-price retailers simply refused to sign agreements. The non-signer clause was devised to meet this problem and was added to the California statute by amendment in 1933. This ingenious provision declared it to be unfair competition for anyone wilfully and knowingly to sell a commodity at a price less than that stipulated in any contract made pursuant to the statute. It then became a relatively simple matter to secure injunctions against price-cutters by establishing the existence of a resale price maintenance agreement and notice to the defendant of its existence, generally by means of a form letter.

The success of Fair Trade in California led to its enactment elsewhere in the country during the succeeding few years and similar statutes eventually were adopted by a total of no less than forty-five states.[6] However, the extent to which the Sherman Act invalidated resale price maintenance agreements under state Fair Trade laws remained an open question. In order to resolve it, bills in the nature of enabling legislation were introduced in Congress, under which resale price-fixing agreements were to be exempt from the prohibi-

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[4] 220 U. S., at 404-5, 408-9.

[5] See *General Electric Co.* v. *S. Klein-on-the-Square*, 121 N. Y. S. 2d 37, 42 (Sup. Ct., N. Y. Co., 1953).

[6] Missouri, Texas and Vermont are the exceptions (in Vermont, resale price maintenance is valid at common law, although non-signers are not bound). The District of Columbia also has no Fair Trade law; it is subject to §3 of the Sherman Act. The state statutes are collected in CCH Trade Reg. Rep. at ¶10,000 *et seq.* (Unless otherwise noted, references are to the 10th edition of this work.)

tions of Section 1 of the Sherman Act when permitted by state law at the place of resale. One of these bills, known as the Miller-Tydings Amendment,[7] finally passed Congress in 1937 as a rider to the District of Columbia Appropriations Act.[8]

Meanwhile, the non-signer clause was subjected to constitutional attack, primarily on the ground that depriving the non-signing retailer of the right to choose his own sales price for his own merchandise constituted a violation of due process. New York invalidated its Fair Trade Act in response to such an argument,[9] but the United States Supreme Court subsequently upheld the validity of the Illinois non-signer clause under the Fourteenth Amendment to the Federal Constitution in the *Old Dearborn* case[10] of 1936. It was of crucial significance to the Supreme Court that, although the retailer owned the merchandise, the trade-mark was still owned by the manufacturer.[11] The New York Court of Appeals at the next opportunity[12] overruled its former decision in reliance on *Old Dearborn,* and this result followed consistently until after World War II in every state where the question was raised.

Fair Trade nevertheless suffered an almost fatal blow in 1951 when the Supreme Court decided, in the *Schwegmann* case,[13] that the Miller-Tydings Amendment was not broad enough to exempt from the Sherman Antitrust Act the enforcement of state Fair Trade statutes by injunction against non-signers. The Court ruled, as a matter of statutory construction rather than constitutional law, that the Miller-Tydings Amendment exempted only contracts or agreements fixing minimum resale prices and did not embrace any other features that might be contained in state legislation. An injunction under a state non-signer clause therefore would constitute unlawful price-fixing if interstate commerce were involved. The scope of "affecting interstate commerce" for the purposes of Sherman Act enforcement had broadened meanwhile to the point where this decision, for

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7 50 Stat. 693 (1937).

8 *Fair Trade: The Problem and the Issues,* H. R. Rep. No. 1292, 82nd Cong., 2d Sess. (1952), p. 19.

9 *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co.,* 269 N. Y. 272 (1936).

10 *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.,* 299 U. S. 183 (1936).

11 299 U. S., at 193, 195.

12 *Bourjois Sales Corporation* v. *Dorfman,* 273 N. Y. 167 (1937).

13 *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951).

all practical purposes, made non-signer Fair Trade useless. For example, a manufacturer engaged in interstate commerce could not enforce Fair Trade against even those non-signers who were located in the same state as the manufacturer himself.[14]

It took only fourteen months for this decision to be overruled by legislation, however. The McGuire Act,[15] which passed both houses of Congress by overwhelming margins in 1952, specifically provides that nothing in any of the federal antitrust laws shall prevent the enforcement of state statutes declaring that it is unfair competition for one to sell merchandise below the resale price fixed in a contract.

The brief taste of freedom enjoyed by retailers under the *Schwegmann* decision undoubtedly contributed to the vigor of the second round of constitutional attacks on state Fair Trade statutes; although this actually had begun in 1949, two years before *Schwegmann*. Florida was the first state after the decision in *Old Dearborn* to invalidate its Fair Trade Act.[16] The Florida Supreme Court emphasized its independence of the United States Supreme Court with respect to the interpretation of the state constitution, and rejected the reasoning of *Old Dearborn* in favor of what it considered the more realistic view that a merchant's freedom of action was curtailed under the non-signer clause without any proper compensating police power objective.[17] Under this decision, Florida is in the same position as California was under its original 1931 statute; a manufacturer can lawfully agree on resale prices but he is impotent to enforce compliance upon a non-agreeing reseller.

At this writing, the highest courts of five states[18] have declared Fair Trade unconstitutional—generally only so far as non-signers are concerned—and courts of first instance in four other states[19] have done likewise. The more populous and commercially important states, however, have tended to reaffirm or at least to leave undisturbed

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14 *Hoffman-La Roche, Inc.* v. *Weissbard*, 11 N. J. 541 (1953); *Cal-Dak Co.* v. *Sav-On Drugs, Inc.*, 242 P. 2d 333 (Cal. App. 1952), remanded after McGuire Act effective, 254 P. 2d 497 (1953); *Bulova Watch Co.* v. *S. Klein on the Square*, 199 Misc. 818 (Sup. Ct., N. Y. Co., 1951).

15 66 Stat. 632 (1952), 15 U. S. C. §45(a)(2) *et seq.*

16 *Liquor Store, Inc.* v. *Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949).

17 40 So. 2d, at 374-5.

18 Florida, Michigan, Georgia, Arkansas and Nebraska.

19 Colorado, Utah, Virginia and Oregon.

their adherence to the *Old Dearborn* line of authority.[20] And the United States Supreme Court recently has made it unmistakably clear that it will not interfere under the Fourteenth Amendment when a state upholds a Fair Trade statute under its own constitution.[21] Since there is nothing for the Supreme Court to review when a state declares a statute invalid under its own constitution, the net effect of these cases is to leave Fair Trade up to the individual states for constitutional approval or disapproval.

So far as the McGuire Act is concerned, it is couched in terms that make constitutional attack difficult and the Supreme Court has declined to review both state and federal court decisions upholding the federal Fair Trade statute.[22] The Attorney General's National Committee to Study the Antitrust Laws in one of its few positive recommendations for legislation has called for the repeal of both the McGuire Act and the Miller-Tydings Amendment on the ground that Fair Trade price-fixing is "an unwarranted compromise of the basic tenets of National antitrust policy."[23] But the Attorney General recently announced that he is reserving decision on whether to recommend legislation to accomplish this result.[24] Moreover, Congressional approval of the Fair Trade principle was so overwhelming when the McGuire Act came up for a vote in 1952 that it would be unrealistic to anticipate a successful repeal movement at least in the immediate future.

It seems therefore that this complicated and controversial statutory scheme will remain in effect—and presumably continue to create controversy—for some time to come. It is the purpose of this article to explore those potentially dangerous areas where an attempt at resale price maintenance may fail and, in so doing, subject the participants to the risk of antitrust liability.

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[20] *E.g.*, New York, New Jersey, Pennsylvania, Illinois, California.

[21] *General Electric Co.* v. *Masters, Inc.*, 307 N. Y. 229 (1954), appeal dismissed, 348 U. S. 892; *Lionel Corp.* v. *Grayson-Robinson Stores, Inc.*, 15 N. J. 191 (1954), appeal dismissed, 348 U. S. 859; cf. *Williamson* v. *Lee Optical of Oklahoma*, 75 S. Ct. 461 (1955).

[22] *Lionel Corp.* v. *S. Klein on the Square, Inc.*, 307 N. Y. 229 (1954), *cert. den.* 348 U. S. 863; *Schwegmann Bros. Giant Super Market* v. *Eli Lilly & Co.*, *supra* n. 1, *cert. den.* 346 U. S. 856 (1953).

[23] Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 154.

[24] New York Times, May 4, 1955, p. 41, col. 2.

A. Exceeding the Scope of the Statutes

The McGuire Act creates a specific exemption from the ban of Section 1 of the Sherman Act for resale price maintenance "when contracts or agreements of that description are lawful as applied to intrastate transactions" under the statutory or other law of the state in which the "resale is to be made, or to which the commodity is to be transported for such resale."[25] Where interstate commerce is affected, so that the Sherman Act would ordinarily be applicable, the initial inquiry under this statutory scheme must be whether the transaction complies with state law at the place of resale. For if it fails to qualify under local law, it automatically fails also to qualify for the antitrust exemption provided by the McGuire Act. Should this be so, the resale price maintenance agreement would be a clear violation of Section 1 of the Sherman Act and all appropriate sanctions would apply to it just as they would to any other Sherman Act offense.

The non-signer clause of the McGuire Act[26] similarly is limited by direct reference to rights of action created by state law. And each local non-signer clause in turn refers back to the particular sort of resale price maintenance agreement described in the Fair Trade Act of the particular state. Hence, attempted enforcement of Fair Trade prices against a non-signer where interstate commerce is involved would fail to qualify for the McGuire Act exemption unless the Fair Trade price was established pursuant to a locally valid resale price maintenance agreement.

Naturally, the first question for consideration in any specific instance is whether the state of resale has a Fair Trade Act in effect and, if so, whether it is enforceable against non-signers. Aside from these rather obvious basic prerequisites, the state statute must be examined in detail because there are variations in numerous particulars from state to state despite the great degree of over-all similarity in the basic approach to the problem.

The most important variation is in the provision establishing who can fix the price. In a number of states, only the manufacturer has that right; in many others, either the owner of the trade-mark or an

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[25] 15 U. S. C. §45(a)(2).

[26] 15 U. S. C. §45(a)(3).

authorized distributor may do so; and some states seem to permit any person selling for resale to fix a Fair Trade price.

Other variations are highly specialized. In Virginia, for example, the Fair Trade Act does not permit the fixing of prices for any article of food or clothing.[27] A purported Fair Trade agreement establishing a resale price for a suit of clothes in Virginia thus would not be enforceable under the Virginia statute, nor would it be entitled to the McGuire Act exemption.

Kansas supplies an example of another local limitation. Although the McGuire Act permits contracts prescribing resale prices for commodities that bear "the trade-mark, brand or name" of the producer or distributor, under the Kansas Fair Trade Act the commodity must bear a registered trade-mark;[28] and this requirement has been construed to mean a trade-mark registered in the United States Patent Office.[29] An agreement fixing a resale price in Kansas for a commodity with an unregistered trade-mark therefore would fail to qualify under both the state and federal Fair Trade statutes.

The foregoing examples demonstrate that individual states sometimes prescribe requirements that are narrower than the scope of the federal statute. Failure to comply with such limitations means that the Fair Trade contract is not "lawful as applied to intrastate transactions" where the resale is to be made. The McGuire Act exemption accordingly does not apply and the contract automatically becomes an unlawful price-fixing agreement under Section 1 of the Sherman Act.

It is also possible for a state Fair Trade Act to permit contracts that are broader than the scope of the federal statute. Although "lawful as applied to intrastate transactions," such contracts would fail to qualify for the McGuire Act exemption also.

In this connection, it is important to note that the McGuire Act in effect permits contracts that accomplish only two objectives, "prescribing minimum or stipulated prices . . . for the resale of a commodity" and "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices for the resale of a commodity."[30] Any state law that permits other provisions in Fair

[27] Va. Code (1950) §59-2(1), CCH Trade Reg. Rep. ¶15,120.02.

[28] Gen. Stat. Kans. (1949) §50-302, CCH Trade Reg. Rep. ¶11,920.02.

[29] Opinion of Attorney General of Kansas, CCH 1946-1947 Trade Cases ¶57,548.

[30] 15 U. S. C. §45(a)(2).

Trade contracts exceeds the scope of the federal statute. To the extent of any such additional provision, a contract even though valid under the local law would nevertheless offend Section 1 of the Sherman Antitrust Act.

The area of greatest potential danger here lies in the variations from state to state in the particular phraseology of what is sometimes referred to as the "boycott clause"—the provision that the second McGuire Act quotation in the preceding paragraph was designed to accommodate. The most common form of boycott clause found in the state laws is typified by the Illinois Fair Trade Act, which exempts contracts containing price-fixing provisions and then goes on to exempt a contract provision, "That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee." [31] This seems to be precisely what the draftsmen of the McGuire Act intended to cover. But Alabama, for example, adds an elaborate exemption for contract provisions as follows: [32]

> "That the seller will not sell such commodity: To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price."

It seems clear that contracts containing such clauses exceed the limits of the McGuire Act exemption and that, at least to the extent of the offending clauses, they are therefore unenforceable under Section 1 of the Sherman Act. It is also to be noted that, while the McGuire Act exempts only restrictions on "a vendee," the quoted provision from the Alabama statute permits restrictions on "the seller." The efficacy under the McGuire Act of any state exemption for seller's clauses is highly doubtful. Although the precise point of statutory construction

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[31] Ill. Fair Trade Act (L. 1935, Sen. Bill 598) §1, CCH Trade Reg. Rep. ¶11,620.01.

[32] Code Ala. (1940), Title 57, ch. 2, §78, CCH Trade Reg. Rep. ¶10,220.02.

does not appear to have been adjudicated under the McGuire Act itself, there is persuasive authority along parallel lines based upon differences between state statutes and the Miller-Tydings Amendment.

The Miller-Tydings Amendment failed to cover three important features of Fair Trade under typical state laws: the right of enforcement against non-signers; the establishment of "stipulated" as well as minimum prices; and the right to require a vendee to enter into price-fixing agreements. The absence of a non-signer clause from the federal exemption legislation was, of course, the principal point of the *Schwegmann* decision. In that case, the Supreme Court also took occasion to point out that the Miller-Tydings Amendment covered only the fixing of minimum prices, while the state statute (Louisiana) permitted the establishment of prices which could not be either raised or lowered.[33] Although the *Schwegmann* case turned on the more dramatic point of non-signer price-fixing, the Court did make it clear in addition that only the minimum price type of state Fair Trade law was exempted by the Miller-Tydings Amendment.[34] The absence of the boycott clause from the Miller-Tydings Amendment similarly has been held to invalidate under the Sherman Act a Fair Trade contract containing this requirement even though authorized by the state statute.[35] All three deficiencies of the Miller-Tydings Amendment have been repaired by specific language in the McGuire Act. Nevertheless, as has been shown, some state laws contain provisions that go too far even by the broadened standards of the McGuire Act.

The underlying principle is that failure to comply with all requirements of both the federal McGuire Act and the state Fair Trade Act at the place of resale converts a Fair Trade contract into unlawful price-fixing banned by the Sherman Antitrust Act. We have seen how this can occur when the state law is narrower than the federal statute, and also when the state law is broader than the federal statute. In addition, there are some practices that will violate both.

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[33] 341 U. S. 384, 387-8.

[34] The Louisiana statute has been amended to provide for minimum prices. La. Rev. Stat. (1950), Title 51, §392, CCH Trade Reg. Rep. ¶12,120.02. Arguments based on the "minimum" versus "stipulated" price discrepancy have not been successful in the state courts. *Pepsodent Co.* v. *Krauss Co.*, 200 La. 959 (1942); *General Electric Co.* v. *S. Klein-on-the-Square*, 121 N. Y. S. 2d 37, 46-7 (Sup. Ct., N. Y. Co., 1953).

[35] *Masters, Inc.* v. *Sunbeam Corp.*, 112 F. Supp. 268 (S. D. N. Y. 1952).

One practical example occurs where the manufacturer attempts to extend price control to include the products of others. The simplest factual situation is the combination package or kit. For instance, the Eastman Kodak Company produces a "Flash Outfit" that includes a "Kodak" camera and other equipment, plus two flash batteries and eight flash bulbs bearing the trade-marks of their own independent manufacturers. Eastman was denied the right to enforce a Fair Trade price for the entire combination package as a unit, because the effect of this would have been to permit Eastman indirectly to fix prices for goods produced by others.[36] And, by means of a consent decree in another proceeding, Eastman has been prohibited from establishing a Fair Trade price for color film because it had included a charge for processing the film as well as for the commodity itself in the fixed retail price.[37]

A more complex situation also has arisen, where the manufacturer of an important component attempts to fix the price of a finished article completed by another. For example, in the wearing apparel field, it is not uncommon for the finished garment to bear the trade-mark of the manufacturer who supplied the fabric; this is sometimes better known than the name of the maker of the garment itself. But it is clear that the fabric manufacturer may not lawfully establish a resale price for the finished garment of which the fabric forms only a part.[38]

Similarly, lenses for eye-glasses are produced in finished form by vendees of lens blank manufacturers. Even though the finished lenses are sold under the trade-mark of the lens blank manufacturer, he may not establish a Fair Trade price for them because that is not the commodity manufactured by him. Again, the scope of the statutes has been exceeded, and Section 1 consequences are inevitable.[39]

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36 *Eastman Kodak Co.* v. *Siegel*, 136 N. Y. S. 2d 800 (Sup. Ct., N. Y. Co., 1955).

37 *United States* v. *Eastman Kodak Co.*, CCH 1954 Trade Cases ¶67,920 (W. D. N. Y. 1954).

38 *Mallinson Fabrics Corp.* v. *R. H. Macy & Co.*, 171 Misc. 875 (Sup. Ct., N. Y. Co., 1939); see *Forstmann Woolen Co.* v. *Murray Sices Corp.*, 10 F. R. D. 367, 371 (S. D. N. Y. 1950).

39 *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942).

B. The Horizontal Proviso; Concert of Action

The Fair Trade statutes create an exemption from the price-fixing prohibitions of the antitrust laws, but the exemption is expressly limited to vertical agreements. Every state Fair Trade Act contains a proviso specifically excluding horizontal agreements from the exemption otherwise afforded to price-fixing. The New York statute is typical; one section of it reads, "This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices." [40] The McGuire Act contains a similar proviso; it excludes from the exemption "contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers"—and then it continues with a further limitation that is not found in any of the state Fair Trade laws—"or between persons, firms, or corporations in competition with each other." [41]

The horizontal proviso does not expressly make anything unlawful; it simply provides that horizontal agreements are not entitled to the exemption created by the Fair Trade statute. Accordingly, horizontal agreements are left to be judged under general antitrust standards. Theoretically, therefore, there is an area where horizontal price-fixing agreements are not unlawful, but nevertheless are not effective to establish Fair Trade prices.

Agreements between competing manufacturers (or wholesalers, or retailers) to establish a fixed price clearly violate Section 1 of the Sherman Act. But what of manufacturers who do not compete? The McGuire Act, by adding to its horizontal proviso the final clause referring to "persons, firms, or corporations in competition with one another," seems to suggest that the preceding portion of the provision includes even manufacturers, producers, etc., who are *not* in competition with one another. A New Jersey court so construed the identical language of the Miller-Tydings amendment.[42] New Jersey also has indicated that its own state statute should be construed to reach that

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[40] N. Y. Gen. Bus. L. §369-c, CCH Trade Reg. Rep. ¶13,520.03.

[41] 15 U. S. C. §45(a)(5).

[42] *Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.*, 129 N. J. Eq. 105, 111 (Ch. 1941).

result, even without the added language found in the federal law. Read literally, the New Jersey Fair Trade Act (almost identical with the New York statute quoted above) denies efficacy to a contract "between producers" whether or not there is any actual competition between them. The situation considered by the New Jersey court was a combination Fair Trade price for a razor and a tube of shaving cream sold together, where the combination price was established jointly by agreement between the razor manufacturer and the shaving cream manufacturer. Despite the absence of competition between the two manufacturers, the New Jersey court stated that this agreement would not qualify under the Fair Trade statute.[43] A New York court, on the other hand, refused to take the words of its state statute literally. Faced with an agreement between two manufacturers who did not in fact compete, the New York court implicitly read into the horizontal proviso the limitation that it operated only to exclude price-fixing agreements between competing producers, competing wholesalers, or competing retailers. The situation considered by the New York court was a Fair Trade price established for phonograph records by agreement between a New York manufacturer and an Italian manufacturer. The New York company was licensed by the Italian company to manufacture records from master recordings produced by the Italian company. The two manufacturers sold their finished products in different parts of the world and thus were not in actual competition with one another. To the New York court, this was enough to save the contract from the horizontal proviso and thus make the Fair Trade price enforceable.[44]

Since all Fair Trade legislation rests so firmly on the distinction between vertical and horizontal price-fixing agreements in their effect upon a competitive economy, it seems entirely logical to give the words of the typical state horizontal proviso their full literal meaning and exclude any agreement between producers or between wholesalers or between retailers. Presumably, the statutes were designed only to afford a manufacturer (or his authorized distributor) the right to set resale prices for his own identified goods. Once another manufacturer participates in the decision, the basic philosophy of Fair

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[43] *Magazine Repeating Razor Co.* v. *Weissbard,* 125 N. J. Eq. 593, 596-7 (Ch. 1939).

[44] *Razor Corp.* v. *Goody,* 121 N. Y. S. 2d 882 (Sup. Ct., N. Y. Co., 1953), affd. 307 N. Y. 229 (1954), *cert. den.* 348 U. S. 863.

Trade no longer applies regardless of the presence or absence of competition between the two manufacturers. Indeed, it is difficult to conceive of a second manufacturer joining in the establishment of a Fair Trade price unless he anticipates some kind of economic benefit as a result. It is conceivable that the absence of actual competition between the two manufacturers would save their agreement from the ban of the Sherman Act, but there seems no reason to permit one manufacturer the right to enforce a resale price that was fixed with the collaboration of another manufacturer.

It may be conceded that the horizontal proviso, especially the version of it that appears in the McGuire Act, is hardly a model of clarity in revealing the legislative intent. It does nevertheless possess a clear meaning on its face, and the view expressed here has the added virtue of providing a function for the final clause of the horizontal proviso in the McGuire Act. If the word "competing" were to be read into all horizontal provisos as a modifier for the words "manufacturers," "producers," and the like, then there would be little sense to the clause in the McGuire Act that adds "persons, firms, or corporations in competition with each other."

Aside from the border-line problems of agreements between non-competing manufacturers, numerous questions of concerted action arise where the horizontal proviso acts to deny efficacy to Fair Trade agreements. Whether or not more severe consequences than mere inability to enforce Fair Trade prices are visited upon the participants depends of course on the context in which the question is raised.

For example, it is established law that Fair Trade contracts are illegal where they are used as part of an over-all scheme for fixing prices throughout an industry. When appropriate facts were established to prove this in a private injunction action by a competing retailer, enforcement against a non-signer was refused.[45] When appropriate facts were established to prove it in a Government civil antitrust action, part of the relief was an injunction against the use of any Fair Trade contracts for a period of six months after the entry of judgment.[46]

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[45] *Schill* v. *Remington Putnam Book Co.*, 182 Md. 159 (1943), *rearg. den.* 32 A. 2d 296 (1943).

[46] *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); cf. *United States* v. *Ideal Cement Co.*, CCH 1940-1943 Trade Cases ¶56,199 (D. Colo. 1942) (consent decree: use of Fair Trade contracts prohibited for two years).

There is considerable evidence of the fact that concerted action in the Fair Trade field has been generated by retailers, perhaps more often than by manufacturers,[47] just as most of the support for Fair Trade legislation has come from retailer organizations rather than from the manufacturers.[48] But this is a particularly dangerous area. A combination of retailers (or wholesalers) coercing a manufacturer into adopting Fair Trade for his products is unlawful whether or not a particular price or mark-up is demanded, and the manufacturer who succumbs to such pressure may find that he is responsible as a co-conspirator.[49]

The problem of retailer pressure was deemed sufficiently serious by the American Fair Trade Council in 1951 for it to adopt an "Anticoercion Resolution" deploring "unlawful collusive action" to force the establishment of Fair Trade prices.[50] It is interesting to note that although the National Association of Retail Druggists criticized the adoption of this resolution, there seemed to be no disagreement with its legal conclusion.[51]

Concerted establishment of Fair Trade prices by competitors would clearly be unlawful, but there is a possibility of evasion in the states that permit wholesalers to establish Fair Trade prices even without express authorization from the manufacturer. In some industries, wholesalers carry full lines of competing products originating with many manufacturers (e.g., books, cigarettes, hardware). It has in fact occurred to more than one cigarette wholesaler that certain economic advantages might ensue were it to establish Fair Trade prices for each brand distributed by it, and make the price of each identical. But the courts have been quick to see that the establishment by a

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[47] Federal Trade Commission, *Report on Resale Price Maintenance* (1945), p. 143; Hearings before the Antitrust Subcommittee of the Committee on the Judiciary on Resale Price Maintenance, H. R., 82d Cong., 2d Sess. (1952), pp. 47-8, 867.

[48] Op. cit. *supra* n. 8, pp. 22-3.

[49] *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); see also the following indictments, which resulted in pleas of *nolo contendere* and the imposition of fines: *United States* v. *National Wholesale Druggists' Assn., No. 618c* (D. N. J. 1941); *United States* v. *National Association of Retail Druggists, No. 683c* (D. N. J. 1941); *United States* v. *New York State Pharmaceutical Association, No. C-114-75* (S. D. N. Y. 1943); *United States* v. *Record Dealers Assn., Cr. No. 15755* (E. D. Pa. 1950); and the following recent indictment: *United States* v. *Maryland State Licensed Beverage Assn., Inc., Cr. 23212* (D. Md. 1955), CCH Trade Reg. Rep. ¶66,169.

[50] Hearings, cit. *supra* n. 47, pp. 887-890.

[51] *Ibid.*, pp. 797-800.

single wholesaler of retail prices for competing brands of merchandise is the equivalent of a forbidden horizontal agreement among the manufacturers themselves, and have denied enforcement against non-signing retailers.[52] It should be noted again that these decisions are significant only where state law permits someone other than the manufacturer to establish Fair Trade prices; in such areas, as a practical matter it is only an exclusive distributor who can safely avail himself of that privilege.

Concerted enforcement of Fair Trade prices is a separate problem by itself. It seems clear that a joint program by competing manufacturers to enforce Fair Trade prices against a retailer would be an unlawful restraint of trade. The anti-competitive effect approximates a boycott and it is not likely that price violations by the retailer would excuse concerted action against him by competitors.[53] Although there seem to be no cases in point, the principle of the decisions involving retailer conspiracies[54] would appear to control.

Concerted enforcement by competing wholesalers against a retailer would be on the same footing as concerted enforcement by competing manufacturers. But enforcement by retailer against retailer must be examined from a different aspect because variations in state statutes and their interpretation come into play. In Pennsylvania, for example, only a party to the Fair Trade contract, or a purchaser from such party, can sue under the non-signer clause.[55] In New Jersey, the manufacturer or wholesaler, or a retailer selling at not less than the stipulated price, may sue; hence an *association* of retailers has no right to bring action under the New Jersey statute.[56] Most states provide simply that "any person damaged" may sue, and this provision gives competing retailers the right to seek injunctive relief against sales below Fair Trade prices. In New York, where the statute contains the "any person damaged" clause, it has been held

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52 *Rayess* v. *Lane Drug Co.*, 138 Ohio St. 401 (Sup. 1941); *Pazen* v. *Silver Rod Stores*, 130 N. J. Eq. 407 (E. & A. 1941).

53 Cf. *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1951).

54 *Supra*, n. 49, see also, *United States* v. *Waltham Watch Co.*, 47 F. Supp. 524, 532 (S. D. N. Y. 1942).

55 *Huberman's, Inc.* v. *Barsky*, CCH 1950-1951 Trade Cases ¶62,767 (Pa. Ct. Common Pleas, 1950).

56 *Bergen County Pharmaceutical Assn.* v. *Barden*, 9 N. J. Super. 480 (1950).

that several retailers may join in one action as plaintiffs,[57] that an association of retailers can finance an enforcement action brought by one of its members,[58] and even that a retailers' association can sue in its own name.[59] It seems questionable that an association could properly qualify as a "person damaged," however.[60] On the other hand, New York courts have denied temporary injunctions to groups of retailers in cases where the defendants asserted a conspiracy by competitors to injure them in their business, and not genuinely to enforce Fair Trade prices established by manufacturers.[61]

There seems to be no objection to a suit by one retailer against another seeking relief with respect to competing brands of merchandise produced by any number of different manufacturers. Unlike the cigarette wholesalers discussed above, who set the prices themselves, the competing retailer has a legitimate objective under the Fair Trade Act in assuring compliance from other retailers, even though his single action may well be the equivalent of concerted action by a group of competing manufacturers. This follows from the basic concept of the Fair Trade laws, which necessarily eliminate price competition at the retail level.

C. The Horizontal Proviso; Vertical Integration

The vertically integrated entrepreneur constitutes a special case under the horizontal proviso, and one that appears to possess a considerable degree of current interest. A manufacturer may own some of the retail stores through which his products are sold to the public; if such a manufacturer enters into a Fair Trade agreement with an independent retailer, is this an acceptable vertical price-fixing contract, or is it unlawful horizontal price-fixing because the manufacturer himself is also a retailer? The answer to this question

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57 *Port Chester Wine & Liquor Shop* v. *Miller Bros.*, 281 N. Y. 101 (1939).

58 *Fogel* v. *Bolet*, 194 Misc. 1019 (Sup Ct., N. Y. Co., 1949).

59 *Office Machine Dealers Assn. of N. Y.* v. *Tytell Typewriter Co.*, CCH 1948-1949 Trade Cases ¶62,344 (Sup. Ct., N. Y. Co., 1948).

60 See *Nassau & Suffolk County Retail Hardware Assn., Inc.* v. *Korvette-Hempstead, Inc.*, CCH 1954 Trade Cases ¶67,783 (Sup. Ct., Nassau Co., 1954). An association seeking to incorporate for the purpose of enforcing the New York Fair Trade Act failed to secure approval for its charter. *In re Fair Trade Enforcement Service, Inc.*, 100 N. Y. L. J. 1337 (Sup. Ct., Kings Co., 1938).

61 *Pordes* v. *Lythe*, 137 N. Y. S. 2d 422 (Sup. Ct., Bronx Co., 1955); *Nassau & Suffolk County Retail Hardware Assn., Inc.* v. *Korvette-Hempstead, Inc*, *supra* n. 60.

can have important economic consequences. It may be a powerful incentive to forward integration if a manufacturer knows he can keep all retailers at a minimum price sufficiently high to assure him that his own retail stores will make a satisfactory profit.[62] On the other hand, if a manufacturer already integrated into retailing finds the right to Fair Trade denied him because of that fact, he may decide to drop the Fair Trade contracts rather than dispose of the retail stores, and this decision may have a noticeable effect on the competitive pattern in the particular industry.

Of course, manufacturer-retailer combinations constitute only one possible variety of vertical integration. Several cases have been brought in the recent past charging that vertically integrated organizations of various types may not establish Fair Trade prices.

The first of these was a Federal Trade Commission proceeding against Doubleday & Co., Inc.[63] Doubleday is a book publisher which also owns several retail stores that sell a full line of books. These stores are in competition with other retailers selling Doubleday books along with those of other publishers.

The Federal Trade Commission next instituted a proceeding against the Eastman Kodak Company,[64] a manufacturer of photographic products which also operates, through subsidiary corporations, several retail stores in various parts of the country. These retail stores are in competition with other retailers selling Eastman's products. The vertical integration of Eastman Kodak was also raised as a defense in a New York state court action by Eastman for injunctive relief against a non-signing retailer of photographic products.[65]

Finally, the Department of Justice has instituted a civil action under Section 1 of the Sherman Antitrust Act against McKesson & Robbins, Inc.[66] This corporation is primarily a wholesaler of

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62 See Note, 64 Yale L. J. 426, 431-3 (1955).

63 F. T. C. Docket No. 5897, complaint issued June 21, 1951. (This proceeding also involved several additional charges.)

64 F. T. C. Docket No. 6040, complaint issued September 8, 1952.

65 *Eastman Kodak Co.* v. *Schwartz*, 133 N. Y. S. 2d 908 (Sup. Ct., N. Y. Co., 1954).

66 *United States* v. *McKesson & Robbins, Inc.*, Civ. 76-50 (S. D. N. Y. 1952), CCH Trade Reg. Rep. ¶66,033.

drug products and, as such, is in competition with other drug wholesalers. In addition, it is itself a manufacturer of some drugs that are distributed in part through its own wholesale organization and in part through competing wholesalers.

At this writing, the vertically integrated organization has been successful in every one of these proceedings. However, the variety of methods used to reach these superficially identical results is itself an indication of how controversial the subject is. The Department of Justice has not acquiesced in the views of the Federal Trade Commission,[67] so that additional steps in the McKesson & Robbins action are to be expected; and the private action by Eastman Kodak in the New York state courts, at last report, was on appeal from the final judgment after trial.

In the *Doubleday* case, a motion to dismiss the charge in the complaint relating to Fair Trade was granted by the hearing examiner on the ground that there was no showing of actual competition between Doubleday's book stores and other book retailers.[68] On an interlocutory appeal to the Commission, the case was remanded to the hearing examiner.[69] An opinion by Chairman Howrey, with whom Commissioner Mead concurred, held that the hearing examiner had not reached "the ultimate question for decision," because he had failed to consider whether the respondent was acting in its capacity as manufacturer or in its capacity as retailer when it negotiated the Fair Trade agreements. Commissioners Carretta and Spingarn each wrote separate concurring opinions in which they arrived independently by different routes at the conclusion that a *prima facie* case had been made out. Commissioner Mason did not participate.

After taking testimony, the hearing examiner dismissed the Fair Trade charge[70] on the authority of the decision of the full Commission in the *Eastman Kodak* case, which is the next to be discussed.

In *Eastman Kodak Co.*, the first step was a motion to dismiss the complaint which the hearing examiner refused to entertain and which was then brought on before the Commission. In an opinion

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[67] Barnes, *Antitrust in 1954*, address before the New York State Bar Association Section of Antitrust Law, January 26, 1955.

[68] CCH Trade Reg. Rep. (9th ed.) ¶11,359 (1953).

[69] *Ibid.*, ¶11,515 (1953).

[70] CCH Trade Reg. Rep. (10th ed.) ¶25,313 (1955).

by three Commissioners, the motion was denied.[71] The majority held that "the agreements are between competitors and are not exempted by the McGuire Act." [72] Chairman Howrey wrote a dissenting opinion; Commissioner Mead did not participate.

The hearing examiner dismissed the complaint after taking evidence.[73] His principal finding was that Eastman had acted as a manufacturer rather than as a retailer in making Fair Trade agreements.

On appeal, the Commission, this time in a unanimous opinion by all five members, affirmed the dismissal of the complaint,[74] but on a different theory. Its principal ground of decision appears to be that "there is nothing whatever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns." Since partial integration was well-known at the time of the passage of both the Miller-Tydings Amendment and the McGuire Act, and since the right of integrated concerns to establish Fair Trade prices was specifically approved on the floor of the Senate during the debates on the McGuire Act, the Commission seemed satisfied that there was no basis for upsetting Eastman's Fair Trade system.

In the private action by Eastman in New York, the court concluded that "Congress did not intend to prevent a manufacturer who *incidentally* either directly or through a corporate affiliate was engaged in the sale of the trade-marked commodity at either the wholesale or retail level from entering into fair trade agreements establishing fair trade prices for its trade-marked commodity at either the wholesale or retail level." [75] In addition, the New York court held that the only horizontal agreements which Congress intended to disapprove by the McGuire Act are those fixing the prices of products of different manufacturers. Since it was only competition in "Kodak" products that was eliminated by Eastman's Fair Trade system, and since that would have occurred under Fair Trade whether or not Eastman owned retail stores, the New York court was

71 CCH Trade Reg. Rep. (9th ed.) ¶11,527 (1953).

72 *Ibid.*, at p. 12,507.

73 *Ibid.*, ¶11,731 (1954).

74 CCH Trade Reg. Rep. (10th ed.) ¶25,291 (1955).

75 *Eastman Kodak Co.* v. *Schwartz*, *supra* n. 65, at p. 920 (emphasis added).

satisfied that this "is exactly the result that Congress intended to accomplish by the McGuire Act." [76]

The only decision thus far in the *McKesson & Robbins* case is a denial of the Government's motion for summary judgment.[77] Although there were copious answers to interrogatories in the record, the court decided the motion primarily on the ground that there were open questions of fact. Judge Murphy wrote: "Since every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the 'true test of legality' in the situation of the producer-wholesaler of dual capacity is whether some *additional* restraint destructive of competition is occasioned." [78] Thus, to Judge Murphy, "the test consists of a factual showing of illegality," and he felt there were insufficient facts for a conclusion on this motion for summary judgment. Judge Murphy also pointed out that the case raised a new and difficult question under the law of Fair Trade; thus he was unwilling to hold any agreements illegal *per se* on the papers before him; and he concluded that "no inflexible standard should be laid down to govern in advance." [79]

The diversity of approaches used by the various Federal Trade Commissioners and judges who have passed upon aspects of this problem is an excellent indication of how muddled the present situation is. Further, it should be noted that both the Federal Trade Commission and the New York court in the *Eastman* cases relied heavily on the legislative history, while Judge Murphy in the *McKesson & Robbins* case declared that the legislative history of both the Miller-Tydings Amendment and the McGuire Act was "unedifying and unilluminating." [80]

D. Fair and Open Competition

The McGuire Act limits the exemption for Fair Trade price-fixing to a commodity "which is in free and open competition with commodities of the same general class produced or distributed by

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[76] *Ibid.*, at p. 922.

[77] *United States* v. *McKesson & Robbins, Inc.*, 122 F. Supp. 333 (S. D. N. Y. 1954).

[78] *Ibid.*, at p. 339 (emphasis in original).

[79] *Ibid.*

[80] *Ibid.*, at p. 336, quoting from Mr. Justice Jackson's concurring opinion in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 397 (1951).

others." [81] All of the state Fair Trade laws contain similar provisions, although most of them use the expression "fair and open competition." There is no indication that the legislators intended any difference between "free" and "fair" in this context, and there seems to be no case pointing to a distinction.

This limitation has a fundamental significance in the Fair Trade scheme of things. The fact that a substitute product must be available for any price-fixed article is considered a guarantee against gouging of the public. The manufacturer who possesses a monopoly, even a perfectly lawful one such as that afforded by a basic patent, is not permitted to establish Fair Trade resale prices because there would be no brake on the extent to which he could cause the public to be overcharged. But it is assumed that where there is competition "with commodities of the same general class produced or distributed by others," no single manufacturer will be able to set his Fair Trade price too high, because that would simply result in his losing trade to his competitors. The requirement of "fair and open competition" is therefore urged as a powerful element in justifying the Fair Trade laws from an economic viewpoint, since it is expected that the evils of price-fixing will be eliminated because of the pressure of competition on the manufacturer.[82] It must be added that a number of economists doubt the efficacy of this provision.[83] In any event, it is clear that the monopolist is not entitled to the benefits of the Fair Trade statutes.

Perhaps the clearest example of the absence of "fair and open competition" would be the establishment of identical Fair Trade prices by collusion between competing manufacturers. But any incident of that sort could be treated more conveniently as a hard-core antitrust violation which, because of the horizontal proviso, cannot qualify for exemption under either the McGuire Act or any state Fair Trade Act.

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[81] 15 U. S. C. §45(a)(2).

[82] National Association of Retail Druggists, *What About Fair Trade?*, p. 17; American Fair Trade Council, Inc., *A Fair Trade Manual For Management*, pp. 10. 21-22; see also *Eastman Kodak Co.* v. *Federal Trade Commission*, 158 F. 2d 592, 594 (2nd Cir., 1946), cert. den. 330 U. S. 828.

[83] Corey, *Fair Trade Pricing: A Reappraisal*, 30 Harv. Bus. Rev. 47, 55 (1952); *Problems of Small Business*, TNEC Monograph No. 17, p. 196.

It has been shown as a matter of actual fact that prices of competing products sometimes are identical,[84] although there may be no collusion. The Supreme Court has made it clear quite recently that conscious parallelism by itself is not enough to constitute proof of a Sherman Act violation.[85] But it may nevertheless be pertinent to ask whether factual identity of price should be acceptable as "fair and open competition." Whether the fact results from "conscious parallelism" or from "price leadership," perhaps commodities carrying identical prices should not be considered to qualify under the Fair Trade laws. The cases provide no answer.

Where the question of "fair and open competition" has been litigated, the actual question for determination has revolved around the presence or absence on the market of "commodities of the same general class produced or distributed by others." The leading case is a Federal Trade Commission proceeding against the Eastman Kodak Company (earlier than the one discussed above under "Vertical Integration") attacking Eastman's establishment of Fair Trade prices for its unique "Kodachrome" color film. The opinion of the Court of Appeals on review introduces the concept of "effective competition," under which it is required that an actual substitute for the Fair Traded product be available on the market. Thus, the opinion points out that, in a sense, champagne and bottled spring water are competitive, because both can be used to quench the thirst. Reasoning away from this *reductio ad absurdum*, the court concluded that black and white film was not in effective competition with color film. Since Eastman was the sole manufacturer of color film, the court affirmed the Commission's order forbidding Eastman to establish Fair Trade prices for it.[86]

The court's opinion leaves unanswered the interesting question of whether more than one substitute for the Fair Traded product must be available in order to avoid forfeiting the exemption. When another manufacturer did in fact introduce a competing color film in 1947, the Federal Trade Commission modified its order to cease

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[84] *E.g.*, all brands of insulin, Hearings, cit. *supra* n. 47, pp. 417-419, 432; six out of ten brands of toothpaste, *ibid.*, p. 123.

[85] *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954).

[86] *Eastman Kodak Co.* v. *Federal Trade Commission*, 158 F. 2d 592 (2nd Cir., 1946), *cert. den.* 330 U. S. 828.

and desist so as to permit the establishment of Fair Trade prices for Eastman's "Kodachrome."[87] But at least one economist has questioned whether a choice between only two products is enough to constitute "fair and open competition."[88]

Various other aspects of this problem have been litigated. The same *Eastman Kodak* case just discussed involved a second point; Eastman also Fair Traded motion picture film packed in patented metal magazines. This was the only film that would fit certain models of Eastman cameras and also certain models of cameras manufactured by competitors of Eastman, because Eastman licensed the manufacture of cameras under its patents, but not the manufacture of film magazines for use in such cameras. This then was a situation in which a patented product, with no effective substitute, was available only from the patentee. It was held that Fair Trade prices could not properly be established for such a product.[89]

On the other hand, if an identical patented product is available from more than one manufacturer, it is held that the statutory requirement of "fair and open competition" has been met.[90] An important consideration in any such case, where the "effective competition" is made possible only by means of patent licensing, would appear to be the actual prices of the products. If the competing commodities are in fact identical because they are produced under the same patent, although by different manufacturers, and the Fair Trade prices are also identical, even though fortuitously, it would seem difficult to justify the assertion that "fair and open competition" is present.

Where the patent is relatively incidental to the product, however, there is no reason to deny its manufacturer the right to establish Fair Trade prices. It is enough that an effective substitute be available; it is not necessary that the substitute be substantially identical. Thus, for example, it has been held proper for the manufacturer of the only toothbrush made with bristles of patented nylon to fix

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87 See CCH Trade Reg. Rep. (9th ed.) ¶11,727.

88 Bowman, *Resale Price Maintenance—A Monopoly Problem*, 25 J. Bus. Un. Chic. 141, 146 (1952).

89 158 F. 2d, at p. 594.

90 *Eli Lilly & Co.* v. *Saunders*, 216 N. C. 163 (1939).

Fair Trade prices for his product;[91] and a particular line of women's stockings has been found to be in free and open competition even though covered by a design patent.[92]

More questionable are the decisions involving commodities whose market appeal is esthetic or intellectual rather than utilitarian, for here the issue of "effective competition" may involve rather different considerations. Phonograph records have been held to be in fair and open competition although each recorded performance of a musical work is unique and the record manufacturer has exclusive reproduction rights in the performance.[93] But it may be doubted whether a fancier of Toscanini's interpretations would consider a Bruno Walter rendition of the same composition an effective substitute; or even whether a Frank Sinatra fan would be satisfied with an Eddie Fisher record of a particular song. And what of those works in the classical repertoire which are available only from a single source because only one recording company has taken the time, trouble and expense to produce them?

Even more dramatic results have been reached with regard to books, which have been held in fair and open competition even though normally each book is protected by a copyright monopoly and available only from a single publisher.[94] It is somewhat grotesque to visualize a customer in a book store putting aside a current best-seller Fair Traded at $4.00 because he is attracted to last season's moderate success by the competitive advantage of its Fair Trade price of $3.50.[95] Yet no one appears to have challenged this decision in other states; and the book industry in fact is one where Fair Trade is commonly employed.[96]

The "fair and open competition" requirement is really the only safeguard provided for the consumer by the Fair Trade Acts. It is unfortunate that, as the Attorney General's Committee recently

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91 *Weco Products Co.* v. *Mid-City Cut Rate Drug Stores*, CCH Trade Reg. Rep. ¶3154.05 (Cal. Super. 1940).

92 *Glen Raven Knitting Mills* v. *Sanson Hosiery Co.*, 189 F. 2d 845 (4th Cir., 1951).

93 *Columbia Records* v. *Goody*, 278 App. Div. 401 (1st Dept. 1951).

94 *Schill* v. *Remington Putnam Book Co.*, 179 Md. 83 (1941).

95 But see *Doubleday & Co., Inc.*, CCH Trade Reg. Rep. ¶25,313, at p. 35,441.

96 Op. cit. *supra* n. 8, at p. 12.

noted,[97] the meaning and effect of this important clause still remain obscure because of the paucity of judicial constructions.

E. Discrimination; Robinson-Patman Problems

The basic provision of the Robinson-Patman Act is a prohibition against charging competing customers different prices for the same article.[98] The Federal Trade Commission decided a relatively long time ago that a manufacturer who controls the prices at which wholesalers resell his product is himself responsible for any discriminations practised by the wholesalers.[99] Indeed, Section 2(a) of the Robinson-Patman Act specifically bans discrimination "directly or indirectly."

One of the few price differentials the Robinson-Patman Act permits is the quantity discount. In order to qualify, however, a quantity discount must "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing . . . quantities in which such commodities are . . . sold or delivered." [100]

These provisions are a proper cause of concern to manufacturers who establish Fair Trade prices for their wholesalers. Quantity discounts are a particularly acute problem; if the manufacturer sets a Fair Trade price at wholesale for one dozen items and a lower unit price when the same article is purchased by the gross, it does not seem likely that the manufacturer would be in a position to establish that the quantity discount was justified by the *wholesaler's* savings in cost. It is not clear from the few decisions that have even approached the price discrimination point how a direct conflict between Fair Trade and Robinson-Patman would be decided;[101] however,

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97 Op. cit. *supra* n. 23, at p. 152.

98 §2(a), 49 Stat. 1526, 15 U. S. C. §13(a).

99 *Kraft-Phenix Cheese Corp.*, 25 F. T. C. 537 (1937).

100 §2(a), *supra* n. 98.

101 See *Burroughs Wellcome & Co.* v. *Johnson Wholesale Perfume Co.*, 128 Conn. 596, 604 (1942); *Calvert Distilling Co.* v. *Brandon*, 24 F. Supp. 857, 858-9 (W. D. So. Car. 1938); *Calvert Distillers Corp.* v. *Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 346 (Sup. Ct., N. Y. Co., 1938); *General Electric Co.* v. *S. Klein-on-the-Square*, 121 N. Y. S. 2d 37, 49, 57 (Sup. Ct., N. Y. Co., 1953); *Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.*, 129 N. J. Eq. 105, 112-3 (Ch. 1941); *Burroughs Wellcome & Co.* v. *Weissbard*, 129 N. J. Eq. 563 (Ch. 1941), affd. 130 N. J. Eq. 605 (E. & A. 1942).

Fair Trade is permissive while Robinson-Patman is mandatory and it is suggested that the true answer lies there.

Discriminatory enforcement of Fair Trade prices by a manufacturer against one or a few retailers in a particular community frequently is raised as an equitable defense to an action for an injunction against a non-signer.[102] It has been argued that deliberate discrimination of this sort, which favors some retailers over others, constitutes an unfair practise under Section 5 of the Federal Trade Commission Act. In a rare action, the Commission made public the text of its official response to a request for an investigation along these lines,[103] apparently emanating from a trade association of retail jewelers. The Commission rather sharply pointed out that the McGuire Act gave it no powers, but instead cut away from the area of the antitrust laws under which the Commission does have jurisdiction. In refusing the request that the matter be made the subject of an investigation under Section 5, the Commission specifically suggested self-help; and added pointedly that if the complaining parties' charges of discriminatory enforcement were accurate, they could with impunity disregard Fair Trade prices and interpose an adequate defense under the state court authorities if enforcement actions were brought against them.

It is intriguing to speculate whether the Commission might have replied differently if the complainants had suggested that discriminatory enforcement was a violation of Section 2(e) of the Robinson-Patman Act, which prohibits a seller from providing services or facilities to a customer unless they are available on proportionately equal terms to all competing customers.[104] Forcing a non-signing retailer to raise his prices to the Fair Trade level benefits that retailer's direct competitors by eliminating price as an element in their competition. Another retailer in the same community might well complain that the manufacturer is not doing anything about suing the discount house around the corner from *his* store. It is conceivable that Fair Trade enforcement against price-cutters in this context

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102 See *Calvert Distillers Corp.* v. *Nussbaum Liquor Store, Inc., supra* n. 101, at p. 346. ("The Fair Trade Act in its very essence calls for uniform enforcement without discrimination or favoritism.")

103 CCH Trade Reg. Rep. ¶3020.90 (1955).

104 49 Stat. 1526, 15 U. S. C. §13(e).

could be considered a "service" provided by the manufacturer which Section 2(e) would require him to make available to all competing customers on proportionate terms.

F. Remedies

The conventional Fair Trade case is an action for injunctive relief against a retailer who has been selling below the established price. The retailer, though he may defend with such vigor and ingenuity as to emerge the winner, rarely strikes back affirmatively. There are exceptions, however, and it is possible that a manufacturer or wholesaler who established Fair Trade prices might be subjected to liability if it appeared that such prices had been maintained unlawfully.

It will be convenient to refer first to one type of affirmative action that has been reported. After the *Schwegmann* case had established that non-signer clauses of state Fair Trade Acts were unenforceable where interstate commerce was involved, a non-signer defendant previously placed under permanent injunction because of a state court's erroneous view of the law had the right to make application in the original action to have the judgment vacated.[105] The technical basis for the invalidity of the injunction under such circumstances is that the state Fair Trade Act conflicts with the federal Sherman Antitrust Act and, under the Supremacy Clause of the Constitution,[106] the state law is ineffective. It is quite clear that any restriction imposed upon a reseller by virtue of a provision of a state Fair Trade Act, which provision conflicts with the Sherman Act because it is not embraced by the McGuire Act, is subject to the application of this same principle. Assuming interstate commerce, the restriction, whether or not enforced by injunction, is invalid because of the operation of the Supremacy Clause. There seems no escape from the conclusion that the person imposing the restriction has violated the Sherman Antitrust Act.

The same conclusion would of course follow where any defect in a Fair Trade system could be established. For example, proof that a

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[105] *Johnson & Johnson* v. *Weissbard*, 11 N. J. 552 (1953); cf. *General Electric Co.* v. *R. H. Macy & Co., Inc.*, 278 App. Div. 939 (1st Dept., 1951) (complaint dismissed and judgment of injunction vacated on plaintiff-respondent's own motion immediately following decision of Supreme Court in *Schwegmann* case, *supra* n. 13).

[106] Art. VI, §2.

manufacturer's products were not in "fair and open competition" would make his Fair Trade contracts ineligible for the McGuire Act exemption and leave the manufacturer in the position of having fixed prices unlawfully in violation of Section 1 of the Sherman Act.

The Supreme Court in the *Schwegmann* case characterized the plaintiff's Fair Trade system, assuming the absence of Congressional approval, as follows:[107]

> "It is clear from our decisions under the Sherman Act (26 Stat. 209) that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it."

To the extent that a manufacturer fails to qualify for the statutory exemption, then, he is subject to full Sherman Act consequences. These include, of course, the private action for an injunction and for treble damages.[108]

There seem to be no reported decisions of any private antitrust actions by retailers against manufacturers claiming that failure to qualify under both the McGuire Act and state law makes Fair Trade automatically a violation of the Sherman Antitrust Act.[109] It is apparent that proof of damage in any such action would be difficult; but such difficulties have been overcome in similar situations.[110] Conceivably, this line of approach might be the next to be adopted by those militant retailers who consider Fair Trade inconsistent with free enterprise.

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[107] 341 U. S., at p. 386.

[108] 15 U. S. C. §§7, 16.

[109] But cf. *E. J. Korvette Co., Inc.* v. *Parker Pen Co.*, CCH 1955 Trade Cases ¶68,034 (S. D. N. Y. 1955).

[110] *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 129 F. 2d 651 (2nd Cir., 1942); cf. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946).

FAIR TRADE: THE FUNDAMENTAL ISSUES

by

MAURICE MERMEY*

Fundamental issues are involved in the current struggle over the Fair Trade laws. These issues are not "free enterprise," or "price-fixing" or similar undefined generalizations. They relate, in part, to the fact that trade-marks are, in a very real sense, property. As the Supreme Court of the United States said in 1936 in *Old Dearborn*:

> "The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself . . .
>
> " . . . We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes." [1]

Loevinger defines property and ownership thereof as follows:

> "Property is the legal relationship which exists between an owner and the thing which is owned; it is not the physical thing itself. The legal relationship is a complicated bundle of rights; and much of the law consists in defining the conditions under which one of the rights may be separated from the rest of the bundle—as in renting, transferring property by will or selling property with certain restrictions. The most important of the rights in the property bundle is not the right of possession or use (which one may have without being a property owner), but the right to exclude others from possession or use of the thing owned or to permit others to have possession only upon some condition, such as the payment of rent." [2]

Along with these considerations are others which stem from differing views as to the nature of our competitive economy and

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* Director, Bureau of Education on Fair Trade, New York.

1 *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936).

2 Loevinger, THE LAW OF FREE ENTERPRISE, 4 (New York, 1949).

reflect the conflict in philosophy and principle with respect to Fair Trade.

Here, then, are issues involved in Fair Trade:

1. Should a product identified by a trade-mark be required to compete with itself, whereas no such requirement is placed upon an individual, enterprise or institution?

2. Should the retailer be granted the exclusive right to establish the consumer price of tangible goods which he owns, which are identified by trade-marks he does not own, despite the wishes of the trade-mark owner?

3. Is the concept of a standard price for an identified product in itself inimical to the American economy?

4. Is an 18th Century theory of competition applicable to a complex mass production, mass distribution economy?

What do the Fair Trade laws do? They exempt certain contracts from the operation of the anti-trust laws. They permit, but do not require, the manufacturer of a product to establish its minimum resale price in such exempted contracts with distributors in each state having a Fair Trade law; provided, (a) the product bears the trade-mark, brand or name of the producer, and (b) it is in free and open competition with articles of similar class produced by others. In a state having a Fair Trade law, the contracts apply not only to all who have signed them but to all resellers with *due notice* of the existence of such contracts. For the Fair Trade laws uniformly declare that:

> "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

It is, of course, known that the Fair Trade laws do not constitute the sole legal basis for the practice of resale price maintenance. This practice has been prevalent in the United States for many decades. It was in use before the first Fair Trade law was enacted by California in 1931; it has expanded substantially during the era of Fair Trade, and it will continue to prevail, absent specific statutory

proscription, even if the Fair Trade laws were to disappear from the American scene. The reason for the existence of resale price maintenance practices, whatever their legal basis, is well set forth in the preamble found in most state Fair Trade acts, as follows:

> "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand or name."

SELF-COMPETITION

Our laws make no requirement for self-competition. An individual is not under the necessity of competing with himself. Indeed, the labor laws permit him to remove his services from competition with the like services of others through their joint designation of a union to act as their collective bargaining agent. Our national policy reflects the view of the American people that it is contrary to the public interest to force individuals to enter into price bidding against competitors to obtain or to hold a job.

Reputable retailers long ago abandoned self-competition. Until the second half of the 19th Century, the American store was like an Oriental bazaar. Varying prices were charged for the same article on the same day by the same merchant—but to different customers—depending on the respective trading skills of customer and clerk. Because this method had long been in use, shopkeepers were comfortable with it; and it took much persistence and persuasion on the part of pioneers like John Wanamaker and A. T. Stewart to change over to the one-price-to-every-customer policy which they advocated. This policy remains today one of the cornerstones of customer good will.

Chain store groups likewise discovered that good will would accrue to them if they charged the same price for the same product at the same time in all their outlets, regardless of differences in operating costs among the various outlets of a particular chain. They discovered that the name of the chain symbolized the good will of the enterprise—the desire of customers to return to the outlets where they had previously made purchases. They also learned that customers resented paying more for a particular product in one outlet

than they or their friends paid for the same product in another outlet of a chain.

In the case of identified products, the Supreme Court in *Old Dearborn* observed:

> "Where a manufacturer puts out an article of general production identified by a special trade-mark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer."[3]

Mr. Justice Holmes, in his dissent from the Supreme Court's decision in 1911, in the *Dr. Miles Medical Co.* case, noted:

> "I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Mile's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of arti-

[3] *Old Dearborn, supra.*

cles which it is assumed to be desirable that the public should be able to get." [4]

Mr. Justice Holmes heartily embraced the philosophy of our antitrust policy. Nor was Mr. Justice Brandeis less ardent in his advocacy of strong enforcement of the antitrust laws. Yet, in 1913 in *Harper's Weekly*, he wrote:

> "The position of the independent producer who establishes the price at which his own trademarked article shall be sold to the consumer must not be confused with that of a combination or trust which, controlling the market, fixes the price of a staple article. The independent producer is engaged in a business open to competition. He establishes the price at his peril—the peril that, if he sets it too high, either the consumer will not buy, or, if the article is nevertheless popular, the high profits will invite even more competition.
>
> "The consumer who pays the price established by an independent producer in a competitive line does so voluntarily; he pays the price asked, because he deems the article worth that price as compared with the cost of other competing articles. But when a trust fixes, through its monopoly power, the price of a staple article in common use, the consumer does not pay the price voluntarily. He pays under compulsion. There being no competitor, he must pay the price fixed by the trust, or be deprived of the use of the article . . .
>
> "The competition attained by prohibiting the producer of a trademarked article from maintaining his established price offers nothing substantial. Such competition is superficial merely. It is sporadic, temporary, delusive. It fails to protect the public where protection is needed. It is powerless to prevent the trust from fixing extortionate prices for its product. The great corporation with ample capital, a perfected organization, and a large volume of business can establish its own agencies or sell direct to the consumer, and is in no danger of having its business destroyed by price-cutting among retailers. But the prohibition of price maintenance imposes upon the small and independent producer a serious handicap . . .
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> " . . . Shall we under the guise of protecting competition, further foster monopoly by creating immunity for the price-cutters?

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[4] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911).

"America should be under no illusions as to the value or effect of price-cutting. It has been a most potent weapon of monopoly —a means of killing the small rival to which the great trusts have resorted so frequently. It is so simple, so effective. Farseeing organized capital secures by this means the cooperation of the shortsighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly." [5]

RULES OF COMPETITION

To understand the need for and function of Fair Trade, it is necessary to understand the essentials of our competitive system, as well as the manner in which it actually operates. The Attorney General's National Committee to Study the Antitrust Laws has taken the following position:

"It is the Committee's view that 'Fair Trade' . . . is at odds with the most elementary principles of a dynamic free enterprise system." [6]

And Attorney General Herbert Brownell, Jr., in an address before the National Retail Dry Goods Association on April 1, said:

"Free competition is the basic American principle which has kept our economy dynamic and vigorous . . . Insulation from genuine competition may have a debilitating effect far more harmful than that resulting from the rigors of competition."

But the Committee nowhere defines "a dynamic free enterprise system," nor does the Attorney General define "free competition" or "genuine competition."

In his book, *The Law of Free Enterprise,* Lee Loevinger defines competition as follows:

"Competition is, to begin with, the striving of conflict between different individuals to gain the same thing or somehow to exceed the other. But the struggle must be conducted according to some rules, or standards, either imposed or agreed upon;

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5 Brandeis, Louis D., "Cut-Throat Prices," *Harper's Magazine* (November 15, 1913).

6 *Report of the Attorney General's National Committee To Study The Antitrust Laws.* March 31, 1955. P. 154.

otherwise, it is not competition but anarchy and warfare. Yet, within the rules, each individual must be perfectly free to act according to his own judgment of his own interest, unfettered either by the power of government or by the strength of economic superiors." [7]

This definition points to the need for some rules to prevent free competition, completely unrestrained competition, from dissolving into anarchy. The fact is that free competition in its pure sense does not exist today in the United States or anywhere else. Given the stubborn imperfections of human nature, the ideal of "free" competition has never been realized and probably never will be. In the interest of the good society, the freedom of the individual to do as he pleases in the marketplace—as in any other area of life—is tempered by the restraints which society itself imposes.

As our economy has grown increasingly complex, the public itself, acting through its elected representatives in state and Federal legislative bodies, has put more and more restraints upon free competition to prevent its deterioration into unbridled, destructive competition. In the earliest days of our Republic, this concern for the effects of unbridled competition upon the public welfare was expressed in legal restraints upon trade practices regarded as dangerous. In the constitutions of many of the original thirteen colonies, there were strong declarations against monopoly. There were price control laws on bread and other vital commodities to check profiteering.

But changing conditions brought new problems respecting competition. Loevinger notes:

"Yet these simple but severe rules of law which had been appropriate to an uncomplicated and an agrarian economy were beginning to fail, even in the eighteenth century, under the impact of the forces generated by the Industrial Revolution. Even the simple rule that all contracts in restraint of trade were void had been deemed too inflexible for changing conditions and had begun to develop complications and qualifications." [8]

Today, the constant necessity for maintaining a delicate balance between the forces of economic expansion and the principles of

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[7] *Supra*, n. 2 at 22.

[8] *Supra*, n. 2 at 12.

human justice has made Adam Smith's ebullient economic man somewhat more circumspect and orderly in America. Our basic antitrust statute, the Sherman Act of 1890, served notice on economic man that restraints had to be put on certain types of competition in order to assure more competition. The Fair Trade laws, of course, are in the same tradition: they seek to curb what they define as unfair competition in order that there may be more competitors.

The Sherman Act was found inadequate for the complexities of our industrial economy. In 1914, Congress added further restraints on unbridled competition to supplement the Sherman Act. It passed the Clayton Act to prohibit practices which might tend to "substantially lessen competition" and the Federal Trade Commission Act, also forbidding unfair methods of competition. The purpose of the Federal Commission Act, as stated on the Senate floor during debate on the bill, is particularly relevant to the purposes and effects of the Fair Trade acts:

> "We are endeavoring to sustain competition . . . it is the only justification for the establishment of a trade commission . . . We have reason to report a rule for the trade commission in the language which has been suggested, viz., 'unfair competition.' It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. That is the 'unfair competition' which this bill endeavors to prevent."

Other restraints on economic man have been imposed. There is the Federal Reserve System, the Securities and Exchange Act, the Robinson-Patman Act, the minimum wage and hour laws, the National Labor Relations Act, Social Security and unemployment insurance. And severely limiting economic man in disposing of his income as he pleases are the personal and corporate income taxes.

Many of these and other statutes which today are regarded as necessary, effective and constitutional by both political parties were bitterly fought, not so many years ago, as being alien to the American way of life and the tradition of free enterprise. For example, a distinguished U. S. Senator prophesied that the Sherman Act would "crush out competition where the people are trying to protect themselves against oppressive monopolies . . . It would be a weapon in the hands of the mighty against the poor."

The Federal Trade Commission, a leading financial newspaper declared, established "a permanent Inquisition with liability to unlimited abuse and the idea itself is an abuse." Of the Robinson-Patman Act, a prominent professor of marketing predicted, "First, the cost of living will be increased to consumers; second, the process of reabsorbing the unemployed will be delayed and impeded; third, I think we shall have moved one step further toward regimentation." The Securities and Exchange Act, a member of Congress maintained, "destroyed the faith and confidence of many people in the value of corporate securities."

Considering the fact that we now have a gross national product and a level of employment and consumption undreamed of even as recently as 1939, it would appear that the opponents of these laws miscalculated their effects. The fact is that these statutes reflected essential needs growing out of the problems of a complicated and increasingly interdependent economy. The same fact applies to the Fair Trade laws.

BRAND NAMES AND GOOD WILL

The context in which Fair Trade must be understood is the American brand-name economy which, not so incidentally, is related to the fact that we have the highest standard of living the world has ever known. The concept and role of the product identified by a trademark or brand name is a very important aspect of our whole free enterprise system. In a study, ***Economic Aspects of Resale Price Maintenance,*** Dr. Gordon Siefkin, Professor of Economics and Dean of the School of Business Administration, Emory University says:

> "Our entire modern market structure and system of mass production and distribution is closely related to the goodwill and reputation which firms establish and to the confidence which consumers come to place in the trademark as evidence of the quality and worth of products. Modern techniques and processes of production and the very complicated nature of some popular consumer items make it impossible for the consumer himself to know or to secure understandable information in all cases concerning the quality of the goods he buys . . . The consumer would be at a complete loss without some knowledge of the producer or the product, or some confidence in the trademark or in the retailer . . .

> "Uniformity and stability in the price of a branded item may be as important as the level of the price itself in giving the consumer confidence that he has made a 'good buy.' "

In upholding the constitutionality of the state Fair Trade laws, the U. S. Supreme Court recognized the value of the trademark as the property of the owner. In the *Old Dearborn* opinion,[9] the high court said:

> " . . . And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trademarks, labels and brands, are legitimate aids to the creation or enlargement of such good will."

Retailers can win good will for their establishments, just as manufacturers can for their brands. A limited number of retailers, moreover, have sufficient resources to develop good will for brands of their own. Most storekeepers however, being not so situated, find it necessary to depend upon the good will symbolized by the brand names of identified products.

It is precisely this product good will which some retailers seek to exploit for their own purposes; the greater the success of the manufacturer in creating good will the greater the retailer's incentive. The popular brand name product is price-cut as bait to attract customers who, these retailers know from experience, will generally buy less familiar articles as well, in the belief that these, too, are being offered at bargain prices. One price cut inevitably provokes another, and a price war is in the making.

There are some manufacturers who believe that price-cutting of their identified products is good business for them. They do not, or should not, engage in resale price maintenance practices. There are others who think quite differently. They believe that the effect of price-cutting on them will be disasterous. Through no fault of their own, they will be deprived, they believe, of the distribution of their goods in the community. Their market will be taken away from them for no reason except that their reputation is good and

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[9] *Supra*, n. 1.

their products are in demand, of recognized value and known to be worth the retail price—else these products would not have become popular.

These manufacturers know from their own experience that, so far as they are concerned, the persistent cutting of prices of their goods is ruinous to them because it restricts their distribution. It tends to concentrate the sale of their goods in very few hands and take them out of the hands of the small dealer, who will not handle them because he cannot sell at the established price in the face of cut price competition and will not sell at the prevailing cut price because they yield him no profit. The goods are cheapened in the public estimation on account of the fluctuating prices, like a depreciated currency. Their reputation is damaged, and the producers' and small dealers' reputations for fair dealing are questioned.

As Edward S. Rogers states in his book, *Good Will, Trademarks and Unfair Trading*:

> "The first step in this process of destruction is the utilization, without permission, of the producer's good will for another's private gain, resulting in damage. The result is the same as if the producer's good will were taken away from him by fraud. The effect is the same as it would be if the element of deception, as in ordinary cases of unfair competition, were present." [10]

What specifically happens to the sales of a trademarked product when it is forced to compete with itself? Let us look at the experience of a leading appliance manufacturer, the Sunbeam Corporation. In the non-Fair-Trade area of the District of Columbia, 20 discount houses in 1953 took over 80 per cent of the company's sales while 600 retailers dropped the product. Sunbeam's sales, as a result, dropped 15 per cent in the District although in the country as a whole where the products were sold under Fair Trade, sales rose 11 per cent. This case history has been duplicated many times over.

POWER OVER PRICE

The Attorney General's Committee appears to believe that power over price, whether the article to be priced is or is not identified by

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[10] Rogers, Good Will, Trademarks and Unfair Trading, 268 (New York, 1914).

a producer's trademark, should be vested exclusively with the retailer. Its premise, presumably, is that of the Supreme Court in the *Dr. Miles* case that, "the complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." [11] This premise is, of course, over-ridden by the Court's later decision in *Old Dearborn.*

To vest the retailer with sole power over the price of an identified article is to clothe him with the power to destroy the good will which rides with the product. Given sufficient resources and determination, the retailer need only persist long enough in a price-cutting program to eliminate that product from his trading area. His price cuts will be met by other retailers who will not, because they cannot afford to, be undersold. In good time, the identified product will become all loss and no leader; and it will then be discarded not only by the generality of storekeepers but also by the retailer who initiated the price war. It has happened this way in actual practice.

Since, as the Supreme Court showed, the manufacturer of a trademarked product retains ownership of the trademark after the product identified by it has passed into the retailer's hands, there is no legal or logical reason why he should not impose conditions respecting the use of his trademark. This is accomplished through resale price maintenance.

RESALE PRICE MAINTENANCE

Fair Trade, however, is only one form of legally accepted resale price maintenance. It is widely practiced in different forms throughout our economy and, indeed, these other forms account for a much larger volume of sales than does Fair Trade. It is puzzling and ironical that the Attorney General's Committee and the Attorney General himself so roundly condemn Fair Trade because it is resale price maintenance, but fail to take cognizance of the other legal sanctions under which resale price maintenance is carried on.

Dr. Walter Adams, Professor of Economics at Michigan State College and a member of the Attorney General's Committee who

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11 *Dr. Miles. Supra.*

dissented from the Fair Trade repeal recommendation, noted in a statement published in *The New York Times* that manufacturers operating retail outlets establish the resale price of their products just as if they fair-traded. He noted that General Motors Corporation through its agency system also "dictates the retail price of its cars as effectively as if they were fair-traded." [12] Dr. Adams pointed out that "the committee said nothing about abolishing forward integration (ownership of stores by factories) or the automobile agency retail price fixing. I believe if one form of retail price maintenance is wrong, all forms are wrong. If we keep one form, we should keep all forms."

With respect to "forward integration," the Federal Trade Commission, itself, in its opinion in the *Eastman Kodak* case upholding the right of a manufacturer who also functioned as a retailer to fair-trade said:

> "We can take judicial notice of the fact that many manufacturers are partially integrated and engage to a lesser or greater degree in some form of wholesaling or retailing activity. In fact, the volume of direct selling in this country has reached tremendous proportions. This is so of manufacturers who 'fair trade' as well as with others. As a matter of fact the practice of selling exclusively through the 'regular channels' of distribution is almost becoming the exception rather than the rule." [13]

In this same opinion, the Federal Trade Commission cites data from the U. S. Department of Commerce study, *Selling the United States Market,* giving the following figures of distribution channels for manufactured products of all industries:

"Sales to or through own wholesale or retail branches or stores	24.5%
Sales to other wholesalers, jobbers or retailers	44.7
Sales to consumers at retail	1.6
Sales to industrial and other large users	26.0
Export sales	3.2
	100.0%"

[12] Adams, Dr. Walter. *New York Times.* April 7, 1955.

[13] Opinion of the Federal Trade Commission in the matter of *Eastman Kodak Co.* Docket No. 6040. Jan. 6, 1955.

In addition to manufacturer-maintained pricing systems used through forward integration, house-to-house selling, and the agency or dealer franchise, resale price maintenance is also carried on under consignment selling. As just one indication of how extensive this is, the newsstand price of every newspaper and magazine in the country is established and maintained by publishers through consignment selling.

The maintained resale price is a standard-of-value price. Its use is not confined to manufacturers. Large retailers with so-called "private brands," who franchise other dealers, require them to maintain the prices on these brands regardless of any other pricing practices in which the giver or receiver of the franchise may engage.

It is significant that no one has ever seriously proposed that all forms of resale price maintenance and all forms of standard pricing be extirpated from the American economy. To do so would produce unthinkable chaos in many areas of American life.

As Dr. Siefkin in his study, *Economic Aspects of Resale Price Maintenance,* notes:

> "So far as the consumer is concerned, it is difficult to distinguish between the case of a large retailing establishment manufacturing its own brand for sale at a quoted price and a situation in which a manufacturer establishes the resale price of his particular brand." [14]

If Fair Trade throttles price competition, so do all other forms of resale price maintenance; for they all require the consumer to pay a uniform price.

Fair Trade, however, has a distinguishing characteristic, which makes the charge of throttling price competition somewhat puzzling. Dr. Siefkin stresses this point, as follows:

> "All of these well-known and widely-accepted business practices involve price-setting from the manufacturer to the consumer. However, all of them differ from resale price maintenance under fair trade laws in one interesting respect. The fair trade laws require that the brand on which the manufacturer sets the resale price must be in open competition with commodities

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[14] Siefkin, Gordon. *Economic Aspects of Resale Price Maintenance.* Incorporated in *Amicus Curiae* brief submitted by Georgia Pharmaceutical Assn. and others to Georgia State Supreme Court in *Cox-Gardner Furniture Dealers* v. *General Electric Co.*, Nov., 1954.

> of the same type produced by other manufacturers. In the case of the other price-setting arrangements referred to above, there is no such requirement . . ."

Fair-traded products, therefore, must, by law, compete with each other and with the many non-fair-traded products on the market. In other words, they are exposed to the impact of what Professor Kenneth Galbraith of Harvard calls "countervailing power." Since Fair Trade is voluntary, no manufacturer is required to fair-trade his product, and many do not. A glance at any retailer's shelves will show the wide diversity of products available to the consumer, all competing in price and quality. Since the consumer always has the final word on what she will buy and what she will pay, every manufacturer, Fair Trade or no Fair Trade, must price his products competitively to win the customer's favor. The sole power over prices rests with the consumer.

The private brands which large retailers have produced for them and which they sell under their own names on their own reputations (and which, as noted, are absolutely price-controlled) offer keen competition to fair-traded national brands. This is in the consumer's interest. Yet the Attorney General is concerned about the competitive effects which private brands have on the small retailer. He believes private brands would be harder to sell "if the nationally advertised brands were offered at varying prices," *i.e.* without Fair Trade.

The growth of private brands, of course, had started prior to the advent of Fair Trade and might well have expanded more rapidly if there had been no Fair Trade. It is part of the trend to giant retailing which we have witnessed in the past several decades. That the absence of Fair Trade will spur rather than check the mushrooming of private brands is indicated by some current facts from the marketplace. In one non-fair-trade area, jewelers are considering banding together to bring out a private brand of watch because discounters in the area have made national brands of watches completely profitless items to handle. And other retailers have likewise turned away from national brands to private brands or to products on which the Fair Trade prices are enforced.

It is certainly true that a manufacturer may fair-trade a product under his own trademark and manufacture a similar product as a

private brand for a large retail chain. There is no inherent conflict here. The retailers handling the trademarked national brand sell it on the manufacturer's reputation, not theirs. The retail chain sells its private brand on its own reputation. The two compete, but the manufacturer's brand is not forced to compete with itself. And the consumer is free to choose whichever, if either, he pleases.

STANDARD PRICES AND THE CONSUMER

The Attorney General, in a public statement, said:

> "It seems evident that the absence of competitive pricing under 'fair trade' results in higher prices for the consumer." [15]

This evidence is not so evident to experts who have looked into the problem. In hearings before the House Committee on the Judiciary in 1952, Dun and Bradstreet said of the feasibility of a survey to determine the effect of Fair Trade laws on the consumer:

> "Our position is that it is virtually impossible, through a survey, to establish the precise effect of fair trade laws on the consumer's pocketbook . . . the first phase of the job—that of determining how much of the consumer's dollar is spent for fair-traded items—is in itself a stupendous task. Even if it were feasible to complete that phase, it would mean little unless we could then establish what effect the pricing of fair-traded items has on the prices of non-fair-traded items. We see no way to do that." [16]

At the same Congressional hearings, the following statement was made by Professor E. T. Grether of the University of California:

> "In the United States there has not been a sufficiently long period of experience under relatively normal market conditions to appraise the full effects of resale price maintenance implemented by the non-signers' clause. During the War, and in the post-war period of inflation, interest shifted from restricting price cutting to restraining inflation. It is important to know that we actually know very little in this country in a measurable sense

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[15] Brownell, Herbert, Jr. Address before the National Retail Dry Goods Assn. April 1, 1955. P. 6.

[16] *Study of Monopoly Power.* Hearings before the Antitrust Sub-committee of the Committee of the Judiciary. House of Representatives. 82nd Congress, 2nd Session, 1952. P. 744.

concerning the full effects of resale price maintenance over a period of years in normal times." [17]

Comprehensive research studies on Fair Trade prices have been conducted since the middle 'thirties. They showed (1) that Fair Trade prices on 50 leading brands of drug products in 1939 had dropped one per cent below the depression prices of these products; (2) that Fair Trade prices on 7,334 drug store items resisted inflationary pressures better than any other prices in the country; (3) that, according to two six-month surveys by the world's largest independent market research organization, A. C. Nielsen Co., consumers paid less on the average, under Fair Trade, for leading brands of drug store products than they paid for the very same products in areas without Fair Trade.

The Attorney General cited a survey based on newspaper advertisements of drug stores in the District of Columbia. Comparing the Fair Trade prices of 736 items with the non-fair-trade prices advertised in the District, the survey purported to show a saving of 28.4% for the consumer in the District.

Such selective surveys have been used time and again, but they can hardly qualify as scientific. In the first place, they are based on advertised prices, not on products actually purchased. Whether the advertised bargains were actually available to all consumers or whether many of them were persuaded to buy "just-as-good" but unfamiliar substitutes is not known. Nor do they show what the worst buys in these stores were. If they had, the surveys might well have shown that such bargains save nothing for the majority of consumers; that Mrs. Jones, who is determined enough to buy only the advertised bargains, is subsidized by the many Mrs. Browns who buy in these stores other merchandise with high profit margins for the retailer. It is a fact that retailers who operate in both fair-trade and non-fair-trade areas heavily promote higher-profit private brands in the non-fair-trade areas where national brands are subjected to price-footballing.

Pick-and-choose surveys merely prove that certain stores sell some fair-traded items for less at certain times in order to attract customers. They do not prove that all stores could or would sell

[17] *Ibid.*, 555.

these same fair-traded items at these same prices without Fair Trade. In fact, if all drug stores in America were to sell all their fair-traded products at 28.4% less, every drug store owner—including the most rabid price cutter—would be in the bankruptcy courts. And if retailers generally were to mark down all their merchandise by any such percentage, there would be no retailing.

In terms of scientific criteria, such surveys would provide valid findings only if they (1) obtained the store-wide pricing margin over the year, showing how low-profit or no-profit items blended together with high-profit items, combined to put the retailer in the black; and (2) compared the store-wide margins of retailers in non-fair-trade areas with the store-wide margins of their opposite numbers in Fair-Trade areas.

No evidence has been adduced that super markets, retail chains, department stores or discount houses in non-fair-trade areas charge less, *over-all,* than their opposite numbers in fair-trade areas.

The contention that Fair Trade allegedly deprives the consumer of "the economies of competitive distribution" reflects a lack of knowledge of merchandising. Dr. Siefkin notes in his study that the argument that:

> " . . . resale price maintenance causes the manufacturer to set the price at a high level sufficient to give adequate margin for the least efficient retailer does not appear to be supported by the available figures on the levels at which fair trade prices have actually been set . . . Furthermore, on theoretical grounds, it is difficult to understand why a manufacturer necessarily in all cases would run the risk of pricing his brand out of the market by establishing a profit umbrella for every retailer regardless of efficiency. Lastly, resale price maintenance does not eliminate all channels through which the very efficient merchandiser can pass benefits of his efficiency on to the consumer in the form of lower prices for some of the items which he sells." [18]

Little is actually known, empirically, about the psychological reactions of consumers to different price levels and to changing prices on a given product. In a recent pioneer study in this area, Dr. Harold J. Leavitt, Associate Professor of Business Administration of the University of Chicago's School of Business, says:

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[18] *Supra,* n. 14.

" . . . in enough cases to be worth counting, we think of a higher price positively, as a symbol of extra quality or extra value or extra prestige. In some cases, perhaps, we buy a higher-priced brand just because it is higher.

" . . . When an established price of one brand is *changed,* we have quite a different psychological phenomenon, for now the consumer has three pieces of information to interpret—the old price of the brand, the new one, and the prices of the competing brands." [19]

Commenting on Dr. Leavitt's findings, Dr. Siefkin writes:

"If, as the experiment suggests, consumers actually do consider that higher-priced brands are of superior quality, in the case of items where it is generally recognized that there are significant brand differences, then a manufacturer of such an item may be justifiably disturbed over the effect which price-cutting may have on consumer opinion of his product's quality." [20]

ECONOMIC AND SOCIAL REALITIES

The Attorney General says:

"How can the small businessman, perhaps starting out with limited capital, hope to compete with a large, well-established store which offers credit, telephone orders, delivery service, and similar conveniences, if he cannot charge lower prices in the hope of winning some customers away from his competitor?" [21]

This assumes that a small store may cut prices on national brands without fear of response and retaliation by big stores. But this simply does not happen in today's marketplace, if it ever happened. Macy's, for example, has a policy of meeting any competitor's price on the same product. No retailer can afford to be undersold. A cut price on a national brand will be met immediately and driven lower in the spiral of a spreading price war. The small retailer cannot hope to win in this kind of a contest against superior dollar resources. At stake is his bread and butter—the national brands for

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19 Leavitt, Harold J. "A Note On Some Experimental Findings About The Meaning of Price." 26, *The Journal of Business*, 206 (July, 1954).

20 *Supra*, n. 14.

21 *Supra*, n. 15 at pp. 4-5.

which manufacturers through advertising have developed a consumer demand.

The position taken by the Attorney General's Committee and by the Attorney General implies that if small business cannot survive under the conditions of unbridled competition, then small business is expendable. Yet the livelihoods of many million Americans depend upon the welfare of small business.

Such an attitude toward small business is in sharp conflict with the attitude taken toward other groups in our economy. The American public has not hesitated to provide subsidies or other special forms of protection to vital segments of the economy when it has been deemed necessary.

Farm parity prices have been provided for agriculture; minimum wage and hour legislation has been granted to labor; tariffs have been accepted as a protection to domestic manufacturers in competition with foreign producers. The American people have long since learned that low prices *per se* are not a national bargain when such prices produce tragedy for substantial segments of our economy.

From an economic standpoint, healthy small business is indispensable to our free enterprise system. The small businessman provides the innumerable retail outlets which are so necessary to secure the mass distribution of national brands of consumer goods and the economies of large-scale production which such sales volume makes possible.

From the political standpoint, there is broad agreement that a strong small business community is a vital bulwark against the growth of collectivism.

From the social standpoint, there are basic reasons for preserving the small businessman. At the community and state level, the contributions of the independent retailer are substantial, for he contributes his share to the well-being of the community and state. He provides employment. He pays taxes which, in his absence, would have to be made up by other segments of the community. He provides support, participation and leadership for community and state activities, such as education, health, religion, recreation and all other forms of voluntary philanthropy and civic improvement.

The public's stake in Fair Trade is not only that of consumer and citizen, it is also that of wage-earner. He consumes most when

his income is highest, and this is dependent upon a high level of prosperity in a dynamic expanding profit economy. Prices were never so low as in the depression but they offered small solace to the consumer who had no job. An economy over-balanced by bigness, at all levels, tends to rigidify rather than to expand. It may well have a formidable standing population of unemployed. It will certainly have very few opportunities for those who wish to be their own bosses.

Even the Attorney General's Committee recognizes the evils in the marketplace against which Fair Trade is aimed. The report says:

> "The Committee acknowledges that 'Fair Trade' enactments reflect some legitimate commercial aims. Nationally advertised and branded consumer commodities readily lend themselves to loss-leader and cut-rate merchandising that can impair substantial investments in business goodwill. Such marketing tactics may alienate established distribution channels whose appeal to consumers emphasizes attractions other than price reductions.
>
> " 'Fair Trade' pricing enables manufacturers and other brand or trademark owners to invoke prompt legal sanctions to check unwelcome promotional selling, thereby protecting 'quality' items from debasement in the consumer's mind. In fact, the objective of preserving valuable investments in trademarks and business goodwill from destructive marketing tactics was the Supreme Court's rationale in the Old Dearborn case that upheld state 'Fair Trade' enactments." [22]

ON THE SIDE OF THE ANGELS?

Repeal of the Federal Fair Trade statutes has been urged by eminent economists and lawyers. Their eminence does not mean they are wrong; neither does it mean they are necessarily right. Indeed, history has shown that eminent men have frequently and energetically asserted the rightness of their position, only later to be found wrong.

It is hard to believe that less than a century ago a great controversy raged in England over the principle of evolution, now a fundamental premise of scientific thought. Darwin, in his monumental *Origin of Species,* suggested the scope of this opposition when he wrote:

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[22] *Report of the Attorney General's National Committee, supra* n. 6 at 153.

"Authors of the highest eminence seem to be fully satisfied with the view that each species has been independently created."

The British prime minister, Benjamin Disraeli, vehemently rejected evolution. When asked, "Am I an ape or an angel?" he replied in 1864: "I am on the side of the angels. I repudiate with indignation and abhorrence those new fangled theories." [23] Darwin had impressive evidence for his theory but it took a long time to win over the leaders of prevailing thought and the public behind them.

The eminents who maintained that the earth was the center of the universe and a flat center at that, who opposed Copernicus and Galileo and Columbus, could not hold back the inexorable advance of scientific knowledge. The facts eventually displaced the stubbornly-held theories of eminent but stubborn men.

The same pattern has been endlessly repeated in the economic, social and political sphere. What is denounced today often becomes tomorrow's indispensable institution, as the history of our own antitrust laws and other restraints upon unbridled competition demonstrates.

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[23] Disraeli, Benjamin. Speech at Oxford Diocesan Conference. Nov. 25, 1864.

ACTIVITIES

THE AMERICAN MANAGEMENT ASSOCIATION, 330 West 42nd St., New York 36, has scheduled a TOP MANAGEMENT CONFERENCE for May 23-25 at the Hotel Roosevelt in New York. A highlight of activities during the last day of the meeting is a luncheon address by Prof. A. A. Berle, Jr. of Columbia Law School, on "Implications of Technological Change for Corporate Managements." Tickets for the luncheon only are $5.00. Charge for the full conference to non-members is $50. The stress in this conference definitely is on automation, although the May 24 afternoon session is given over to a discussion of company growth, through diversification and acquisition.

THE FEDERAL BAR ASSOCIATION, EMPIRE STATE CHAPTER, 201 Varick St., New York 14, has announced a symposium on MERGERS AND THE ANTITRUST LAWS for the evening of May 25 (7:45 p. m. at the United States Court House in Foley Square). Guest speakers will be Judge Stanley N. Barnes, co-chairman of the Attorney General's National Committee, and Gen. William F. Donovan. There is no admission fee. A number of antitrust experts will participate in the question-and-answer period following the major speeches.

At the annual meeting of the NEW YORK PATENT LAW ASSOCIATION on May 26 (Palm Terrace Suite of the Hotel Roosevelt), dinner speakers will be Prof. Milton Handler of Columbia Law School and Laurence I. Wood, counsel for General Electric. The topic is PATENT AND TRADE-MARK ASPECTS OF THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE. Cocktails will be served beginning at 6:15 p. m., dinner is at 7. Only the dinner portion of the meeting is open to non-members of the Association. Tickets, at $5.00 each, may be purchased from Albert F. Bower, 233 Broadway, New York 7.

Looking ahead to the sessions of the SECTION OF ANTITRUST LAW at the American Bar Association annual meeting in Philadelphia, Monday through Wednesday, August 22-24, competitive conditions and the Attorney General's Committee Report will be the major topics. At the Tuesday morning meeting, attention will be given to

the first three chapters of the Report, with papers to be presented by Charles I. Thompson of Philadelphia, Goldthwaite H. Dorr and George Nebolsine of New York City, and Hubert Hickam of Indianapolis. At the luncheon that day Thomas E. Sunderland of Chicago will review highlights of judicial, administrative and legislative antitrust activity during the year. The remaining chapters of the Report will be analyzed at the Wednesday session by Dean Edward H. Levi of the University of Chicago Law School, R. Dean Moorhead of Austin, A. D. H. Kaplan of Washington, D. C., and William B. Carman of Los Angeles. Further details on these meetings will be given in next month's BULLETIN.

BOOK REVIEWS

VAN CISE, JERROLD G., UNDERSTANDING THE ANTITRUST LAWS (Practicing Law Institute: New York) 1955. Pp. 171. $2.00.

Many things have been written and much has been said about the antitrust laws. The author of this book has been active in this field. Only last year he was co-editor of a book entitled "How to Comply With the Antitrust Laws." It is our opinion that that work put the cart before the horse. We now have the proper order with the latest work of Mr. Van Cise, although it might more aptly have been titled "An Effort to Understand the Antitrust Laws."

Mr. Van Cise's approach and organization are sound. He commences at the proper starting point, the statutes, and progresses to the significant and applicable case law. Conceding that comprehension of the antitrust laws is not easy sailing, he clearly sets out the ostensible conflicts and confusions and reassures the reader that psychiatric assistance is not necessary.

The book also contains a chapter on "The Department of Justice and the Antitrust Laws," by Hon. Stanley N. Barnes, who is Assistant U.S. Attorney General in charge of the Antitrust Division, and a complementary chapter by Hon. Edward F. Howrey, chairman of the Federal Trade Commission, on his agency's functions under the antitrust laws.

WILCOX, CLAIR, PUBLIC POLICIES TOWARD BUSINESS (Richard D. Irwin, Inc.: Chicago) 1955. Pp. 898.

A text for college students entering on courses in economics and political science. It undertakes to explore the problems of competition from the viewpoints of business, government and the public welfare. The multifarious forms of activities restricting competition are explained, as are various public and private measures taken to combat these situations.

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